Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1022

M. M. MILES, JACK R. WOOD, and JACQUELINE S. WOOD,
Petitioners

V.

THE HON. J. FOY GUIN, U. S. DISTRICT JUDGE and BANK OF HEFLIN, a corporation, *Respondents*

RESPONSE TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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JURISDICTION

Respondent BANK OF HEFLIN states that this case does not fall within the ambit of any of the character of reasons which this Court considers, under its Rule 19, in determining when to grant writs of certiorari.

Said Respondent would further show that the grant of certiorari in this case would be a prelude to a consideration of directing the United States Circuit Court of Appeals, Fifth Circuit, to grant a discretionary writ of prohibition or mandamus in a case where the Petitioners will have, if the case is decided against them, an adequate remedy by way of appeal.

QUESTIONS PRESENTED

Respondent BANK OF HEFLIN says that the real questions presented in this case, as raised by the original complaint filed with the District Court, are the following:

1. Should the denial of the extraordinary writ of prohibition or mandamus by a United States Circuit Court of Appeals be reviewed by this Court when:

(a) The Petitioner has an adequate remedy by way of appeal, and

(b) The issuance of such writs is discretionary with the Court from whom sought, and

(c) The Complaint in the District Court alleges that the aid of the District Court is necessary to protect or effectuate its judgment in a prior proceeding, and

(d) The Complaint in the District Court alleges a deprivation of and seeks redress of rights protected under the Constitution of the United States as provided for in 28 U. S. C. Section 1343 (3), and

(e) The District Court has never considered the case on its merits and has not received or considered any evidence by way of affidavit, oral hearing or otherwise, and is asked to decide a factual question on a motion to dismiss, and

(f) The judgment of the Supreme Court of Alabama, entered subsequent to a final Federal District Court judgment involving a federal question, conflicts with said Federal District Court order and ignores the same?

2. Is the judgment of the highest court of a State excluded from the jurisdictional provisions of 28 U.S.C. Section 2283 which allows a United States District Court to protect or effectuate its judgments?

3. Are the unsolicited (by any party) actions of the highest court of a state, with regard to matters never submitted to it for determination by any party, totally excluded from the jurisdictional provisions of 28 U.S.C. Section 1343 (3) which provides for jurisdiction "to redress the deprivation, under color of any State law, etc. of any right, privilege or immunity secured by the Constitution of the United States etc.", when said highest State Court has directed the grant of a statutory penalty against a party and the party against whom said order is granted:

(a) Has no notice that a claim for such a penalty will be considered at any court level, nor an opportunity to defend against the same, (with the party in whose favor said penalty is granted arguing before said highest State Court that said penalty should not be granted by said highest State Court), and

(b) Is denied the opportunity by the direct, unsolicited action of the highest Court of a State to present and raise defenses provided for under the same statute which provides for the penalty, and

(c) Is denied access to State Courts by the direct, unsolicited action of the highest Court of a State, to have its rights and obligations under said penalty statute determined by the State Courts without subjecting itself to a severe penalty, and

(d) Is arbitrarily, capriciously and discriminatorily denied

(1) A fair application of the procedural and substantive law of said State as previously and subsequently determined and applied by the highest Court of said State; and,

(2) A fair consideration of the facts favorable to the party against whom said penalty is granted;

All of which has the cumulative effect of said highest State Court assuming the role of an advocate and denying the party against whom said penalty

is directed due process of law and equal protection of the law secured to it by the Constitution of the United States (said cumulative denials being specifically alleged in Section 9 of the original complaint at pages 7a through 10a of the Appendix to the Petition for a writ of certiorari filed in this Court)?

4. Does the consideration of the judgment of the highest Court of a State by a United States District Court constitute a review of or appeal from said judgment when said State Court judgment involves questions under the United States Constitution which were not submitted to nor considered by said highest State Court nor any other State Court, and when the action of said highest State Court is totally on its own initiative and is in of itself a deprivation of rights or privileges secured by the United States Constitution?

5. Is a judgment of the highest Court of a State subject to petition for writ of certiorari to this Court when said judgment is not final and does not consider nor decide any Federal or Constitutional questions?

6. Is a party to be relegated to the unlikely remedy of a writ of certiorari being issued to the highest Court of a State by this Court, when that State Court has, on its own initiative and not as a result of considering matters submitted to it on appeal or through review of a lower State Court or by any parties at any stage, ordered a statutory penalty against a party, which violates its rights under the Constitution of the United States?

7. Does a United States District Court have at least pendent jurisdiction to consider deprivation of constitutional rights by the highest Court of a State if it also has original jurisdiction to protect or effectuate its judgment?

8. Is a motion to dismiss a favored method of determining if a claim is stated upon which relief can be granted?

STATEMENT OF THE CASE

The Respondent Bank of Heflin makes the following additions to the Petitioners' Statement of the Case in order to correct inaccuracies or omissions therein, with reference to matters alleged in the Complaint.

Petitioners' Statement of the Case

fails to make it clear that, prior to the final judgment of the Alabama Supreme Court, the Federal District Court had assumed jurisdiction of the same subject matter, with regard to the revelation of certain records and had enjoined Petitioners from inspecting said records and Respondent Bank from revealing said records to Petitioners. Further that the Federal District Court's final judgment was rendered before the final judgment of the Supreme Court of Alabama, which penalized Respondent Bank for failing to reveal the same records, among others, to Petitioners. That said Federal District Court order is final as against Petitioners and was not appealed. That the right of Petitioners to see such records, considered in the Federal District Court's judgment, formed the very basis of Respondent Bank of Heflin's original action for declaratory judgment, the filing of which the Supreme Court of Alabama held subjected the Bank to a penalty. That the Supreme Court of Alabama had knowledge of said Federal District Court order prior to its final judgment and ignored it and made no reference to it.

Petitioners' Statement of the Case fails to state that the summary judg-

ment motion which the Supreme Court of Alabama ordered granted was served five days after the only hearing in the Circuit Court and was filed seven days after said only hearing and that Respondent Bank of Heflin had no notice of said motion nor an opportunity to defend against it and that the Supreme Court of Alabama chose to ignore this fact. Further that said summary judgment motion was not considered by any lower court, nor argued for by Petitioner before the Supreme Court of Alabama, but was simply granted by the Supreme Court of Alabama, totally on its own initiative and solely because it appeared in the transcript, without referring to or considering its late filing or lack of notice to the Bank of Heflin. Said matter was not even considered an issue by any party before the Supreme Court of Alabama because it had not been argued for by Petitioners nor considered by any lower court. The Supreme Court of Alabama inexplicably took the total initiative to grant it.

Petitioners' Statement of the Case further fails to state that in their briefs, filed with the Supreme Court of Alabama, Petitioners argued that the Respondent Bank of Heflin was entitled

to a trial with regard to the question of the statutory penalty and that the Supreme Court of Alabama directed that said penalty be awarded to Petitioners; contrary to Petitioners' own arguments.

Petitioners' Statement of the Case fails to call attention to the fact that the Supreme Court of Alabama, totally on its own initiative, without consideration at any point by any lower court or argument by the Petitioners, determined that the filing of a suit by the Bank of Heflin to determine its rights under said penalty statute, in of itself subjected said Bank to a severe penalty, without said Supreme Court of Alabama ever mentioning or discussing the constitutional ramifications of such a ruling.

Petitioners state "that the District Court has determined to exercise jurisdiction and to re-try issues already presented to and decided by the Courts of Alabama . . . . . ." This statement is untrue in that none of the Courts of Alabama have ever decided the federal question involving F.D.I.C. records nor has any such State Court decided any constitutional question.

Petitioners fail to point out that the

final judgment of the United States District Court, which the original complaint in this case says is in total conflict with the judgment of the Supreme Court of Alabama, was entered prior in time to the judgment of the Supreme Court of Alabama, and is now a final ruling which was never appealed.

We further call attention to the fact that the Appendix to the Petition filed by Petitioners does not include an Amendment to Respondent Bank of Heflin's original Complaint which was filed on July 9, 1976.

REASONS FOR DENYING THE WRIT

Procedural Reasons

Among the procedural reasons why a Writ of Certiorari should not issue in this case are the following:

1. The Petitioners have an adequate remedy by way of appeal. In such cases such extraordinary writs are not due to be granted. *Re Transportes Maritimos do Estado,* 264 U.S. 105, 68 L. Ed. 580, 44 S. Ct. 236.

2. The Writ of Prohibition is not one of right, but one of sound judicial

discretion. *Ex parte Peru* 318 U.S. 578, 87 L. Ed. 1014, 63 S. Ct. 793. Also this Court's rule 30.

3. This case does not fall within the scope of this Court's rule 19, which provides that Writs of Certiorari will be granted only when there are special and important reasons therefor.

4. The real thrust of Petitioners' argument in this case is that the action does not state a claim upon which relief can be granted. The Court in *Arthur H. Richland Co. vs. Harper* (1962, CA5 Fla) 302 F 2 324, stated that such motions are viewed with disfavor and that a final disposition of a civil action on bare bones of pleadings is a torturous thing.

5. Petitioners have argued that the correct remedy of this Respondent was to request this Court to issue its Writ of Certiorari. Said remedy would have been unlikely and questionable for the following reasons:

(a) The case did not fall within the scope of this Court's Rule 19.

(b) The judgment of the Supreme Court of Alabama was not a final judgment and the amount of damages was still to be determined, which amount would have bear-

ing on the severity and thus the constitutionality of the penalty.

(c) The Alabama Supreme Court did not determine nor decide any constitutional issues. It simply ignored them.

6. This Court held in *Bell vs. Hood,* 327 U. S. 678, 90 L. Ed. 939, 66 S. Ct. 773, that a Federal District Court is bound to entertain a case where a claim for relief is made under the constitution and laws of the United States unless such claim is wholly unsubstantial and frivolous. Certainly the Federal District Court is best able to determine, after oral hearing, arguments, and briefs, whether such claim is unsubstantial or frivolous. In addition, the Federal District Court has jurisdiction to determine if a three-judge court should be empanelled to determine if the penalty statute is unconstitutional.

Substantive Reasons

For purposes of this response we have not gone into a long discussion of the applicable law on the merits. The following are certainly indicative of the fact, as the record and briefs on file in the Supreme Court of Alabama will reveal, when introduced at the

hearing, that the District Court has a right to hear the case. Please remember that, in all instances, the matters referred to are matters which were raised, for the first time, by the Supreme Court of Alabama *on its own initiative,* without any submission to it on the points involved by either party.

l. Federal Courts can enjoin parties from bringing action in state court, when the subject matter of the suit was the same as that covered by a decree of the Federal Court. *Missouri Pacific Railroad vs. Jones,* (CC Mo. 1909) 170 Fed. 124.

2. Application of penalty statutes in such a fashion as to invoke severe penalties merely because a party seeks to construe a statute or its terms in Court is unconstitutional. *Wadley Southern Ry Co. vs. State of Georgia,* 35 S. Ct. 214, 235, U. S. 651, 59 Led. 2d 40

3. There can be no due process without reasonable notice and a fair hearing. *MacKenna vs. Ellis,* 263 F 2d, 35, C.A. Tex (1959). Certiorari denied, 79 S. Ct. 1453, 360 U. S. 935, 3 Led. 2d 1645.

4. The fact that a judgment may be justified on the merits does not obviate

the requirement of a fair hearing. *N. L. R. B. vs. Bryan Manufacturing Co.,* C. A. 7 (1952) 196 F 2d 477. In this case the record will reveal that the Supreme Court of Alabama did not grant a fair hearing or anything approaching one.

5. Application of a rule of law which penalizes persons for exercise of Constitutional right is a violation of the Fourteenth Amendment and a Court cannot award damages under it. *Hosey vs. Club Ban Cortlandt* D. C. N. 1 — (1969) 299 F supp. 501.

6. All of the foregoing relate to the following: A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of a Federal Court, and such jurisdiction cannot be made to stand or fall upon the way the Court may chance to decide an issue as to legal sufficiency of the facts proven. *West Coast Exploration Co. vs. McKay,* C.A. D.C. (1954) 213 F 2d 582 93 U.S. App., D.C. 307, Certiorari denied 74 S. Ct. 850, 347 U.S. 989, 98 Led. 1123.

There are numerous cases which state, in many different ways, the fact that various matters which reflect on questions of a fair hearing raise ques-

tions of denial due process. There has never been any case which says that the highest State Courts are immune to such requirements of due process. Further, there has never been a case which says that such highest State Courts are totally immune to the provisions of 28 U.S.C. 1343 (3).

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR DENYING THE WRIT

In effect the Petitioners seek a writ in a case which does not fall within the scope of any of the character of reasons stated in Rule 19, of this Court's rules, to review a discretionary denial of an extraordinary writ by the United States Court of Appeals for the Fifth Circuit; all on a matter for which there would be an adequate remedy by way of appeal. If ever a case presented itself in which the grant of a writ of certiorari is inadvisable, the immediately foregoing statement indicates that this is it.

The very zeal which Petitioners demonstrate in seeking to deny this Respondent an opportunity of the case being heard on the merits, indicates the doubt which Petitioners have with

regard to their position if a thorough analysis of the record and briefs filed in the Supreme Court of Alabama is ever made by the United States District Court. The trial of such a case would involve only the introduction of the record and the briefs in the Supreme Court of Alabama and a fair consideration of them by the District Court. Surely this would work no undue imposition on the Petitioners even if the District Court ultimately decides that Respondent is not entitled to relief. The normal appeal procedure would not involve as much procedural difficulty as does seeking an extraordinary writ from Fifth Circuit and subsequent review by this Court.

This Court's own Rule 30 states that:

"The issuance by the Court of any writ authorized by 28 U.S.C. Section 1651 (a) is not a matter of right but a matter of sound discretion sparingly exercised."

Although rule 30 is not fully applicable here the only ultimate effective result of a review in this case, which would be advantageous to Petitioners, would be to require the issuance of such an extraordinary writ and the principle involved in Rule 30

should be even more obvious when the same type relief as is sought here has been previously sought and denied in a United States District Court and in a United States Circuit Court of Appeals.

In the case of *Bell vs. Hood,* (1946) 327 U.S. 678, 90 Led 939, 66, S. Ct. 773, this Court held that, where a complaint claims a right to relief under the Constitution and laws of the United States, the District Court is bound to entertain it unless the alleged claim is clearly immaterial. In this case such claims are not immaterial but form the whole basis of the action. Certainly where there has been a good faith allegation that the District Court's prior judgment has been effectively ignored by a State Court, the District Court has the right to protect or effectuate its judgment under 28 U.S. Section 2283, and even more certainly it has a right to consider, on the merits, whether such protection is called for.

The case of *Jackson vs. Carter Oil Company* (C.A. 10th 1950) 179 F2d 524, Cert denied 340 U.S. 812, 71 S.C. 39, 95 Led 597, discusses the effect of 28 U.S.C. Section 2283 on prior law and declares that said Section 2283 revised the prior law and

gave Federal District Courts the power to protect its prior judgments.

In *American Surety Company vs. Baldwin* (1923) 287 U. S. 156 77 Led 231, 53 S. Ct. 98, this Court stated that a District Court has jurisdiction, regardless of the citizenship of the parties, to enjoin the enforcement of a judgment of a State Court where it has been rendered without notice or consent in violation of the due process clause. To like effect is *Boynton vs. Moffat Tunnel Improv. Dist.* (1923) CA 10th Colo 57 F2nd 772, Cert den 287 U.S. 620 77 Led 538, 53 S. Ct. 20.

No case has ever held that United States District Courts do not have jurisdiction to consider claimed denials of the due process or equal protection of the laws. The cases have consistently held that parties cannot appeal to District Courts from decisions of State Courts. However, such cases have assumed that the parties have litigated the same question in State Court, after due notice and after constitutional questions have been voluntarily submitted to said State Courts for decisions.

In *Jack's Fruit Company vs. Grower's Marketing Service* (1923) C.A. 5th 488 F2d 493, 494, the Court said:

"In civil litigation, except for habeas corpus proceedings, a federal district court has no jurisdiction to review final determinations of federal constitutional questions *voluntarily submitted* to and decided by State Courts . . . . ." (Emphasis ours)

In the instant case no constitutional questions were submitted to the Alabama Supreme Court. It simply ignored them and violated constitutional rights on its own initiative.

On a full hearing by the District Court it will be obvious that, not only did the Respondent Bank of Heflin not have any notice of the possibility of the ultimate judgment of the Alabama Supreme Court, the Petitioners themselves never considered it as a remote possibility as indicated by their briefs. Neither party ever submitted the matter in dispute to any State Court for decision. All we ask is an objective consideration. Only a full hearing and consideration by the trial court can determine if the record and briefs reveal that the allegations of the complaint are true.

A very fundamental question at issue in this case is the denial of access

to Court. The Supreme Court of Alabama, on its own initiative, without it being claimed nor argued for by Petitioners, and without notice to this Respondent, ruled that the filing by this Respondent of an action for declaratory judgment to have its right under a penalty statute determined, per se subjected it to a severe penalty (over $30,000.00) under the statute. Such action is declared to be in violation of the United States Constitution in the following cases:

Hynes vs. Dickson, D.C. Cal (1964) 232 F Supp 796.

U.S. ex rel Mayberry vs. Prusse, D.C. Pa. (1963) 225 Supp 752.

National Association for Advancement of Colored People vs. Patty. 79 S. Ct. 1025 360 U.S. 167, 3 Led 2d 1152.

Gilmore vs. Lynch, 21 S. Ct. 864, 401 U.S. 906, 27 Led 2d 804 Affirmed *Younger vs. Gilmore,* 92, S. Ct. 250, 404 U.S. 15, 30 Led 2d 142.

St. Louis I.M. & S. Ry Co. vs. Williams, 40 S. Ct. 71, 251, U.S. 63, 64 Led 139.

Ex Parte Young (1908) 209 U.S.

123, 52 Led 714, 28 S. Ct. 441. This case is clearly not one for Certiorari. Petitioners seek to avoid a full hearing because they know the unfairness of the penalty which was imposed,

Respectfully submitted,

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RESPONSE OF THE HON. J. FOY GUIN, U. S. DISTRICT JUDGE

Respondent Hon. J. Foy Guin, United States District Judge, joins in this Response for the purpose of adopting the reasons as to why a writ of certiorari should not be granted. He reserves judgment on the substantative arguments, stated in a factual manner, except to the extent that said factual allegations relate to the right of Respondent Bank of Heflin to be heard thereon.

CERTIFICATE OF SERVICE

I, Gordon F. Bailey, Jr. Counsel for Respondent and a member of the Bar of the Supreme Court of the United States, certify that I have served a copy of the foregoing Response to Petition for Writ of Certiorari on James D. Pruett, 610 Chestnut Street, Gadsden, Alabama 35901 Counsel for Petitioners, and on the Honorable J. Foy Guin, United States District Judge, United States Courthouse and Federal Building, Birmingham, Alabama 35203, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to them at the above addresses, the 18 day February, 1977.

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